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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

PATRICIA INGRAM, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a district court excludes scientific expert testimony under the Federal Rules of Evidence pursuant to *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), is the standard of review on appeal: (1) whether the exclusion was "manifestly erroneous" (as five Circuits hold); (2) whether it was an "abuse of discretion" (as five other Circuits hold); or rather (3) whether it can withstand a "hard look" that is "more stringent" and explicitly disfavors exclusion (as the Third Circuit held here)?

LIST OF PARTIES

Petitioners in this Court are General Electric Company, National Railroad Passenger Corporation, the City of Philadelphia, Southeastern Pennsylvania Transportation Authority, Monsanto Company, American Premier Underwriters, Inc., and the Budd Company.

Respondents as parties to the proceeding in the Court of Appeals are Mabel Brown, George Burrell, Priscilla Burrell, Amber Burrell, Monica Hilton, Wallace D. Cummins, K. Louise Jones, Harvey Jones, James Lament, Christopher Brown, Jacqueline Michelle Brown, Cathlene Brown, Craig Brown, Margherita Barbetta, Mary Retta Johnson, Celeste Brown, Clemmon Brown, Cloyd Brown, Curtis Brown, John Ingram, Sr., John Ingram, Jr., Patricia Ingram, April Ingram Robinson-Ray, Mary Alice Knight, William Butler, Theresa Butler, Bryan Jackson, Allen Simpson, Donald Simpson, Karen Simpson, Marvin Simpson, Matthew Cunningham, Bessie Cunningham, and Westinghouse Electric Corporation.

LIST PURSUANT TO RULE 29.1

Petitioner General Electric Company is a publicly held New York corporation with no parent companies. Its subsidiaries, other than wholly owned subsidiaries and subsidiaries whose shares or debt securities are not publicly held, are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward & Company, Inc.; General Electric Capital Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financial Services, Inc.; and Dart & Kraft Leasing Corporation.

Petitioner National Railroad Passenger Corporation is a District of Columbia corporation. It has no parent companies. Its subsidiaries are Chicago Union Station and Washington Terminal Company.

Petitioner the City of Philadelphia is a Pennsylvania City of the First Class, pursuant to 53 PA. STAT. ANN. § 101.

Petitioner Southeastern Pennsylvania Transportation Authority is a Metropolitan Area Transportation Authority existing pursuant to the Pennsylvania Public Transportation Law, 74 PA. CONS. STAT. §§ 1701-1785, Act No. 1994-3, by terms of which it is a "body corporate and politic" and an "agency and instrumentality of the Commonwealth." It has no subsidiaries.

Petitioner Monsanto Company is a publicly held Delaware corporation with no parent companies. It has no subsidiaries other than wholly owned subsidiaries.

Petitioner American Premier Underwriters, Inc., formerly known as The Penn Central Corporation, is a publicly held Pennsylvania corporation with no parent companies. Its subsidiaries, other than wholly-owned subsidiaries, are Insurance (GB), Ltd.; Casualty Underwriters, Inc.; Detroit Manufacturers Railroad Company; New York & Harlem Railroad Company; Pennsylvania-Reading Seashore Lines (co-owned with the Reading Railroad Company); and Pittsburgh & Cross Creek Railroad Company (co-owned with the Norfolk & Southern Railroad Company).

Petitioner the Budd Company is a Michigan corporation and is a wholly-owned indirect subsidiary of Thyssen AG, a publicly held German corporation. The Budd Company has no subsidiaries other than wholly-owned subsidiaries. Its subsidiary Budcan Holdings, Inc. owns a less-than-78% common stock interest in Budd Canada, Inc., a publicly held Ontario, Canada corporation. The Budd Company's subsidiary Milford Fabricating Company owns a 50% common-stock interest in E.T.M.F., Inc., a Michigan corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in these cases August 31, 1994.

OPINIONS BELOW

The opinions of the District Court that excluded certain testimony and granted summary judgment are unreported and are reproduced in the Appendix at A. 169a.[1] The opinion of the Court of Appeals is reported at 35 F.3d 717 and is reproduced at A. 1a. The order of the Court of Appeals denying rehearing is unreported and is reproduced at A. 160a.

JURISDICTION

The judgment of the District Court was entered October 21, 1992. A. 302a.[2] The judgment of the Court of

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[1] References herein to "A." are to the Appendix filed herewith, and to "R." to the record in the joint appendix in the Court of Appeals.

[2] A separate opinion of the District Court dealing with property-damage issues that are not raised in this petition was rendered November 13, 1992.

Appeals was entered August 31, 1994. A. 1a. A timely petition for rehearing was denied October 14, 1994. A. 160a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Rules 104, 401, 402, 403, 701, 702 and 703 of the Federal Rules of Evidence appear in Addendum B at pp. B1-B3, *infra*.

STATEMENT

A group of plaintiffs who lived near the railroad yard at Paoli, Pennsylvania brought these actions claiming to have suffered more than fifty different illnesses as a result of exposure to PCBs (polychlorinated biphenyls) that were used as fire-retardant fluid in railroad transformers at the railroad yard. The defendants manufactured PCBs or transformers, or owned or operated the yard or the equipment used there. The cases were brought in or removed to the United States District Court for the Eastern District of Pennsylvania. The only issue presented in this petition is what standard the Court of Appeals should have applied when it reviewed the District Court's decision on admissibility of expert opinions.

A. Earlier Proceedings.

The plaintiffs, respondents here, relied on expert witnesses to establish the essential elements of their case—exposure, causation and injury. The defendants, petitioners here, challenged the admissibility of those opinions under Rules 702, 703, 402 and 403 of the Federal Rules of Evidence.

Initially, based upon deposition admissions by the plaintiffs' proposed experts, and affidavits from a panel of prominent scientists that the proffered opinions lacked any basis in science, the District Court held the expert testimony inadmissible as not meeting the standards of those Federal Rules; it then granted summary judgment for the defendants. *In re Paoli R.R. Yard PCB Litigation*, 706 F. Supp. 358 (E.D. Pa. 1988). The Third Circuit reversed on procedural grounds and remanded for

further proceedings: it held that the District Court had not adequately explained its rulings and had not allowed the plaintiffs "an adequate opportunity to present their factual and legal contentions" as to whether the opinions had scientific basis; in remanding, the Court of Appeals admonished that "the most efficient procedure that the district court can use . . . is an *in limine* hearing." *In re Paoli R.R. Yard PCB Litigation,* 916 F.2d 829, 836, 859 (3d Cir. 1990). At that stage a petition for certiorari seeking to review the procedural requirements imposed and whether the District Court's rulings had been supported by the record was denied, and the case returned to the District Court. *General Elec. Co.* v. *Knight,* No. 90-1309, 499 U.S. 961 (1991).

B. District Court Hearing and Ruling.

After remand, the District Court did hold an *in limine* hearing, so extensive that it lasted for five days. Plaintiffs offered opinions of two physicians (as to injury, causation, and alleged need for many years of "medical monitoring") and one physicist (opining as to whether levels of PCBs in the plaintiffs' blood were abnormal). Defendants presented nine scientists and physicians, both leading practitioners and professors of medicine, including heads of departments in teaching hospitals. These experts testified:

> — That the principal physician relied on by the plaintiffs was not medically qualified, would not be recognized as competent either to diagnose or to treat, and was offering opinions not based on any reliable medical methodology;
>
> — That the experts offered by the plaintiffs had not followed the methodology of science that is required before one could support the opinions they offered;
>
> — That the plaintiffs' experts had relied on data that were not data of a kind relied on by scientists for the purposes the experts sought to use them;
>
> — And that both in scientific particulars and in conclusions, the opinions being offered were not rec-

> ognizable as science, and would not be accepted as such by scientists in the relevant disciplines.

The plaintiffs presented no witnesses to support the qualifications and methodology of their experts, other than the experts themselves.

The District Court after hearing the testimony and reviewing exhibits then made findings of fact and concluded that the opinions were inadmissible. It filed detailed and comprehensive opinions as to each, citing to the hearing record and explaining the bases for each of its evidentiary rulings. A. 169a, 215a, 251a, 282a, 311a, 333a, 346a. In particular, it excluded under Rules 702, 703 and/or 403, expert opinions of:

1. A medical doctor who had not treated any patient since 1976 but had appeared as a plaintiff's or claimant's expert in 800 cases; who had concededly never failed to diagnose PCBs as the cause of whatever illness was claimed by any person claiming exposure to PCBs; and who had not even examined most of the plaintiffs as to whom these medical opinions were offered.[3] Five medical teachers and practitioners [4] testified, and the District Court

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[3] The proffered expert opinion was that exposure to PCBs had caused the plaintiffs to suffer headaches, dizziness, insomnia, memory disturbance, Parkinson's syndrome, hyperactivity, metastatic brain tumor, glaucoma, episcleritis, ringing in ears, infections, pleural thickening, obstructive lung disease, restrictive lung disease, asthma, pneumonia, respiratory distress, mitral insufficiency, aortic sclerosis, carotid stenosis, congestive heart failure, aortic insufficiency, abdominal pain, enterocolitis, nausea and vomiting, diabetes mellitus, splenomegaly, stomach cancer, hematuria and urinary infections, premature breast development, polychondritis, arthritis, neuropathy, muscular weakness, vascular insufficiency, bone abnormality, multiple skin problems in a new-born, increase in melanocytes with pigmented lesions, anemia, anisocytosis and poikilocytosis, pancytopenia, lymphocytosis, myeloproliferative changes with bone marrow hypercellularity, eosinophilia, megaloblastic maturation of erythroid, myeloid and megakaryocyte series, elevated alkaline phosphatase, elevated lactic dehydrogenase, elevated CPK and SGOT, elevated triglycerides, and elevated glucose. R. 442-45; see A. 188a-189a.

[4] They were Paul M. Roediger, M.D., Chief of General Internal Medicine and Director of Medical Education at Abington Memorial

found, that no recognizable scientific methodology could support these opinions, and that this doctor, although holding a degree, would not be granted admitting privileges by any hospital and was unqualified to treat patients or diagnose medical conditions. A. 187a. The District Court held the expert unqualified and these opinions inadmissible under Rule 702 for failure to follow any reliable scientific methodology, and alternatively under Rule 403 as misleading and likely to confuse a jury. A. 206a, 209a, 210a.[5]

Hospital, A. 175a; Jordan N. Fink, M.D., Professor of Immunology at the Medical College of Wisconsin and past President of the American Academy of Allergy and Immunology, A. 173a; James Leyden, M.D., Chief of Dermatology, University of Pennsylvania Medical School, A. 176a; Robert W. Morgan, M.D., S.M. Hyg., former Professor of Preventive Medicine and Epidemiology at the University of Toronto and Director of the Stanford Research Internal Center for Community Health Studies, A. 178a; and Michael R. Weitekamp, M.D., F.A.C.P., Chief of General Internal Medicine at Hershey Medical Center and Associate Professor of Medicine at Pennsylvania State University Medical School, A. 178a-179a.

[5] The District Court found, for example, based on the testimony of the doctors at the *in limine* hearing, that the proposed expert was ignorant of the most basic medical facts, A. 182a-187a; did not know the difference between blood serum and blood plasma, A. 180a; opined as to "antigenic damage," which cannot exist because antigens do not damage, A. 182a; was unaware of well-known differences between chloracne and common acne, A. 185a-186a; failed to order standard laboratory tests, A. 187a; did not know how to interpret the tests that were ordered (from an unaccredited laboratory), A. 181a-182a, 184a-185a, 197a; claimed expertise in toxicology without having taken a single course on that subject, A. 173a, 186a, 212a; relied on newspaper articles as scientific medical authority, A. 196a-197a; and blamed PCBs for illnesses without considering that such illnesses had well-known common causes, A. 183a, 188a-191a, 195a, 207a. See A. 204a-206a. The unrebutted testimony of the former head of the American Academy of Allergy and Immunology was that the proposed expert lacked basic medical knowledge that "should be right in the forefront of knowledge of any internist, any resident, any medical student," and that as for the medical methodology employed, "I couldn't find any." A. 189a. Others confirmed that lack of medical knowledge and scientific methodology. A. 189a, 190a, 206a.

2. Another medical doctor who sought to present the opinion that "even one molecule" of PCBs was sufficient to cause illness—even though it was undisputed that small levels of PCBs are present in nearly everyone. He opined that all the plaintiffs required at least 25 years of "medical monitoring," A. 261a, offering this opinion although he had never met any of the plaintiffs, had never seen their medical records, and had never ordered any standard tests of them. A. 255a, 261a. Based upon testimony of three physicians "that the methodology used . . . is neither standard nor reliable," A. 266a-267a, because "Dr. DiGregorio merely assumes that all of the Plaintiffs are extremely sensitive to PCBs, such that even the slightest exposure will cause serious injuries," A. 262a, 264a, the District Court found that this opinion lacked any basis in known medical methodology, and excluded it under Rules 702 and 703. A. 259a, 269a-271a. It also excluded under Rule 702 the "medical monitoring" opinion, finding that "Dr. DiGregorio's methodology in rendering this opinion is non-existent, and therefore completely unreliable." A. 278a.

3. A physicist who would opine, contrary to nationally accepted data, that the plaintiffs had abnormally high levels of PCBs in their blood. Actual blood tests established that the level of PCBs in the plaintiffs' blood when measured did not exceed the "background" levels regarded by accredited medical laboratories as normal throughout the United States. But the plaintiffs' proposed expert said that the accepted background levels were incorrect, relying on his own unique extrapolations from a 1970's survey of cadaver fat (not blood) samples, which a leading toxicologist testified, and the District Court found, were neither "accurate" nor "reliable" for such a purpose. A. 244a, 248a. The District Court excluded this opinion under Rules 702 and 703. A. 249a.

Because these opinions were necessary to support essential elements of the plaintiffs' claims, the District Court then granted summary judgment, citing *Celotex Corp.* v.

Catrett, 477 U.S. 317 (1986). A. 299a, 303. The plaintiffs appealed, arguing that the District Court's rulings based on the five-day hearing violated the Federal Rules of Evidence.

C. Court of Appeals Review and Reversal.

The portion of the Court of Appeals' opinion to which this petition is directed occupies only three pages, A. 51a-53a, also reprinted in Addendum A, *infra* at pp. A5-A8. On appeal the defendants cited many authorities holding that rulings of a district court as to admissibility of expert opinions may be reversed only if "manifestly erroneous." *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962). But the Court of Appeals in an opinion by Judge Becker ruled that after this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 113 S. Ct. 2786 (1993), "there is a significant risk that district judges will set the threshold too high." A. 52a, *infra* p. A7.

> "[G]iven the enormous power of the district court to foreclose submission of a party's case to a jury on the basis of a threshold determination of nonreliability of opinion evidence, we conclude that the review requires a 'hard look' to insure that the district court's exercise of discretion was sound and that it correctly applied the several *Daubert* factors."

A. 15a, *infra* p. A3.

Therefore, the Court of Appeals held, hereafter when district courts exclude expert testimony and summary judgment will result, the Third Circuit in reviewing *Daubert* rulings will use a "heightened abuse of discretion review," A. 51a, *infra* p. A6, applying "a hard look at (more stringent review of) the district court's exercise of discretion." A. 52a, *infra* p. A6.

> "[W]hen the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a 'hard look' (more stringent review, cf. *Brody* v. *Spang,* 957 F.2d [1108] at 1115 [(3d Cir. 1992)]) to determine if a district court has

abused its discretion in excluding evidence as unreliable."

A. 53a, *infra* p. A8 (footnote omitted).

The Court of Appeals then applied its new "more stringent" "hard look" standard to reverse many of the District Court's admissibility rulings:

1. The Court of Appeals reversed the District Court's findings that the principal medical witness lacked the expertise required by Rule 702. Rejecting the District Court's reliance on unchallenged testimony of the five prominent physicians that the witness was unqualified to practice medicine or diagnose, the Court of Appeals held that it was sufficient that the witness long ago had once been on the consulting staff of a hospital, had published articles, and had served on committees—even though the Court of Appeals acknowledged the witness to be "arguably a relatively poor clinician," "less than fully credible" and "the number of mistakes she made was quite significant," and referred to what it called "Dr. Sherman's somewhat dubious expertise." A. 60a, 61a, 85a. Contrary to the testimony of the eminent physicians at the hearing, which the District Court had found credible and convincing, the Court of Appeals concluded that "many of Dr. Sherman's mistakes seem minor." A. 61a.[6]

2. The Court of Appeals also rejected the District Court's crediting of the experts who testified as to the diagnostic and analytical process of medical science, and reversed the District Court's Rule 702 finding as to reliable methodology. The District Court based on the record had concluded that it simply is not a "reliable methodology" to opine that PCBs had caused ailments which by no

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[6] For example, in the words of the Court of Appeals:

"Dr. Fink concluded that these gaps in knowledge were 'major deficits. They—these items should be right in the forefront of knowledge of any internist, any resident, any medical student.' The district court concluded that these 'major deficits' removed Dr. Sherman from the category of expert.

"We disagree." A. 60a.

known medical theory they were capable of causing. A. 206a, 209a. Nevertheless, the Court of Appeals held that as to plaintiffs examined, "Dr. Sherman's scientific methodology was reliable," A. 17a, and that "the district court should have presumed that her testimony was reliable." A. 85a.

3. The Court of Appeals also reversed the District Court's ruling, A. 210a-211a, that had alternatively excluded these opinions under Rule 403.[7] "The 403 ruling will be reversed," the Court of Appeals said, because "[w]e fail to see what characteristics of Dr. Sherman's testimony would make it the subject of the type of 403 balance necessary for its exclusion." A. 97a.

4. The Court of Appeals went on to reverse the District Court's findings that the other physician's opinion—that exposure to "one molecule" of PCBs was sufficient to require compensation for at least 25 years of medical tests for patients whom he had never examined—was not based on recognizable medical methodology or any known medical theory. The Court of Appeals ruled that "[w]e agree with plaintiffs that Dr. DiGregorio could reliably testify as to a patient's future risks without examining the patients," A. 141a-142a, even though it acknowledged that his assumption was that this need for "medical monitoring" tests "would be true of anyone exposed to even one molecule of PCBs." A. 140a.

5. Although the District Court had excluded as unreliable the data and methodology used by the plaintiffs' exposure expert, who had revised the established national background level of PCBs, the Court of Appeals after reading the hearing record concluded:

> "after taking a hard look, the court's conclusion that the (converted) fat data is not reasonably relied upon does not survive the foregoing analysis. Aided by the preference for admissibility of such evidence

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[7] Rule 403 authorizes the trial court to exclude testimony whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

under the rules, the NHATS data is reliable enough . . . and it passes *Daubert* muster." A. 106a.[8]

6. The Court of Appeals also held that the District Court could not rely on the hearing testimony to conclude under Rules 402, 403, 702 and 703, A. 290a-291a, that animal experiments, although sometimes useful in identifying risk, were unreliable to establish that PCBs could cause particular human ailments without confirmation from actual human epidemiological data. Although the Court of Appeals acknowledged that several other courts had reached exactly the same conclusion in this context as the District Court,[9] it nevertheless disagreed—and, under its new "more stringent" standard of *Daubert* review, reversed. A. 117a-121a.

Having held that all these admissibility rulings by the District Court failed to satisfy the "hard look" standard of review for *Daubert* rulings, the Court of Appeals reversed the summary judgment as to all claims for medical monitoring whether or not the plaintiffs had ever been examined, and also reversed as to all personal-injury claims except those in which the plaintiffs had not been examined by the proffered experts. A. 18a-19a. Judge Roth, concurring, disagreed with the portion of the majority's holding, A. 41a, that "[a] judge frequently should find an expert's methodology helpful even when the judge thinks that the expert's technique has flaws sufficient to render the conclusions inaccurate." A. 159a. Rehearing was denied. A. 160a.

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[8] Reversing the District Court's finding after the hearing, the Court of Appeals held that "[w]e are satisfied that Dr. Nisbet's calculation of background blood levels from National Human Adipose Tissue Survey ('NHATS') fat data was based on a reliable methodology." A. 18a.

[9] *E.g.*, *Turpin* v. *Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir.), *cert. denied*, 113 S. Ct. 84 (1992); *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 839 (D.C. Cir. 1988); *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190, 1194 (1st Cir. 1987).

REASONS FOR GRANTING THE WRIT

The familiar starting point in any federal appeal is the standard of review by which the court of appeals is to judge the district court's ruling. Last year in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), this Court held that district judges are to exercise "a gatekeeping role" as to admissibility of scientific opinions. 113 S. Ct. at 2798. But this Court did not address the standard by which such rulings are to be reviewed on appeal. The courts of appeals have been left to determine what their standard of review of evidentiary rulings after *Daubert* should be. Nearly all have now done so, and they have reached differing answers.

Four Circuits now have held that the standard of review continues to be, as this Court held it was before *Daubert*, that a district court's rulings on admissibility of expert opinions will be affirmed unless they are "manifestly erroneous;" a fifth Circuit applies that standard in most cases. But five other Circuits review under a simple "abuse of discretion" standard, while sometimes emphasizing the trial judge's "broad discretion."

The Third Circuit in this case, however, has adopted an extreme standard unlike any of the others, that is far more hostile to district court exclusions under *Daubert*. In the Third Circuit, district court admissibility rulings, if they exclude expert testimony, are now subjected to a "hard look," that is "more stringent" and that explicitly disfavors exclusion. Were it not for the Court of Appeals' adoption of that new standard, the detailed and meticulous findings and rulings of admissibility by the District Court here could not have been reversed. This departure, which puts the important Third Circuit at odds with the law applied in ten other Circuits, can be settled only by this Court.[10]

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[10] The Third Circuit's standard has some support from one commentator, who argued that *Daubert* should be read as establishing a new rule that "[a]ppellate courts need not defer to the trial court's reliability determination." Giannelli, *Daubert: Interpreting*

I. THE THIRD CIRCUIT'S "HARD LOOK" STANDARD OF REVIEW IS IN CONFLICT WITH THE STANDARD USED IN TEN OTHER CIRCUITS.

The standard of review to be applied to trial court rulings on admissibility of expert opinions comes up so often that in the less than eighteen months since *Daubert* was decided, nearly all the Circuits now have addressed it.[11]

1. Five Circuits apply a highly deferential "manifestly erroneous" standard of review.

— The First Circuit thus holds that "[b]ecause gauging an expert witness's usefulness is almost always a case-specific inquiry, the law affords trial judges substantial discretion in connection with the admission or exclusion of opinion evidence," and "a trial judge's rulings in this sphere should be upheld 'unless manifestly erroneous.'" *United States* v. *Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993), *quoting in part Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962).

— The Second Circuit agrees that "[a] decision to allow expert testimony is within the broad discretion of the trial judge and 'is to be sustained on appeal unless manifestly erroneous.'" *United States* v. *Daccarett*, 6 F.3d 37, 58 (2d Cir. 1993), *cert. denied sub nom. Creaciones Viviana Ltda.* v. *United States*, 114 S. Ct. 1294, 1295, 1538 (1994); *accord, United States* v. *Locascio*, 6 F.3d 924, 936 (2d Cir. 1993) (district court's ruling will be affirmed unless "manifestly erroneous"), *cert. denied sub nom. Gotti* v. *United States*, 114 S. Ct. 1646 (1994); *United States* v. *Amuso*, 21 F.3d 1251, 1263 (2d Cir.) (decision under Rule 702 whether to admit expert testimony "will be disturbed only if it was manifestly erroneous"), *cert. denied*, 115 S. Ct. 326 (1994).

— The Fifth Circuit holds that *Daubert* leaves unchanged the rule that "[a] trial court's ruling re-

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the Federal Rules of Evidence, 15 CARDOZO L. REV. 1999, 2011 (1994).

[11] No pertinent decision of the Eleventh or Federal Circuits has yet been reported.

garding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous." *Rosado* v. *Deters*, 5 F.3d 119, 124 (5th Cir. 1993), *quoting Christophersen* v. *Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992).

— The Sixth Circuit agrees that "[t]he scope of this discretion [of the district court] has been broadly construed, and the trial court's actions are to be sustained 'unless manifestly erroneous.'" *United States* v. *Bonds*, 12 F.3d 540, 554 (6th Cir. 1993), *quoting in part United States* v. *Green*, 548 F.2d 1261, 1268 (6th Cir. 1977); *accord, Cantrell* v. *GAF Corp.*, 999 F.2d 1007, 1014 (6th Cir. 1993) (same).

— The Seventh Circuit, in a case decided a few days before *Daubert*, reiterated that a trial court's admissibility decision "will generally not be disturbed unless it is manifestly erroneous," but then added that "we will review *de novo* the reliability of the scientific facts, data, and techniques utilized" by the witness. *Cella* v. *United States*, 998 F.2d 418, 423 (7th Cir. 1993) (affirming exclusion by district court). Then after *Daubert*, *in Mars* v. *United States*, 25 F.3d 1383 (7th Cir. 1994), noting that "[t]he issue that we have been discussing is important," it explained that the kind of *de novo* review referred to in its *Cella* decision would be confined to cases where the issue was whether an entire class of scientific evidence was inadmissible. 25 F.3d at 1384. It also has emphasized that "[i]f the judge is not persuaded that the so-called expert has genuine knowledge that can be genuinely helpful to the jury, he should not let him testify." *Wilson* v. *City of Chicago*, 6 F.3d 1233, 1238-39 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1844 (1994).

2. Instead of the "manifestly erroneous" standard of deference, five Circuits follow a simple abuse-of-discretion standard of review:

— The Fourth Circuit holds that rulings under *Daubert* are "committed, as are most questions of admissibility of evidence, to the discretion of the district courts." *United States* v. *Bynum*, 3 F.3d 769, 773 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994).

— The Eighth Circuit in reviewing rulings under *Daubert* also follows the standard of abuse of discretion. *United States* v. *Martinez*, 3 F.3d 1191, 1198 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994); see also *Sorensen* v. *Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994) (affirming exclusion because "the hypotheses presented by plaintiffs' experts follow no scientific principles").

— The Ninth Circuit also applies what it describes as an "abuse of discretion" standard. *United States* v. *Jones*, 24 F.3d 1177, 1179 (9th Cir. 1994); *United States* v. *Rincon*, 28 F.3d 921, 923 (9th Cir. 1994) (adhering to "abuse of discretion" standard after remand by this Court, 114 S. Ct. 41 (1993), for reconsideration in light of *Daubert*), *cert. denied*, 63 U.S.L. WEEK 3421 (U.S. Nov. 29, 1994).

— The Tenth Circuit holds that "[t]he trial court's decision to admit expert testimony is reviewable for abuse of discretion." *United States* v. *Markum*, 4 F.3d 891, 895 (10th Cir. 1993); *accord*, *United States* v. *Muldrow*, 19 F.3d 1332, 1337 (10th Cir.), *cert. denied*, 115 S. Ct. 175 (1994); *United States* v. *Davis*, 1994 U.S. App. Lexis 31992 (10th Cir. Nov. 15, 1994) (district court's admissibility ruling "will be disturbed only for a clear abuse of discretion").

— The District of Columbia Circuit similarly reverses only for abuse of discretion, although it emphasizes that trial courts in ruling on admissibility of expert opinions are to be allowed "broad discretion." *Joy* v. *Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993).

3. Finally, in the present case the Third Circuit, through a judge often cited in federal evidence matters,[12] uniquely has announced a standard of "more stringent review" and "hard look" for appellate review of district court admissibility rulings under Rules 702, 703 and 403—if they exclude—and has explicitly stated that this new standard is intended to disfavor district courts' excluding expert opinion testimony. Thus, instead of allowing the trial court that heard the testimony the benefit of affirmance unless "manifestly erroneous," or according at least an abuse-of-discretion deference to the trial court, the Third Circuit has gone far in the opposite direction. Its decision to subject trial judges' exclusions of scientific opinions to a "hard look" is not to be found in *Daubert,* nor in the Federal Rules of Evidence, nor in the decisions of any other Circuit.

II. THE THIRD CIRCUIT'S STANDARD IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *DAUBERT* v. *MERRELL DOW PHARMACEUTICALS* AND *SALEM* v. *UNITED STATES LINES.*

Prior to its ruling in *Daubert* last year, and prior to the adoption of the Federal Rules of Evidence, this Court had consistently ruled that

> "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."

Salem v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). That standard of appellate review was first announced by this Court in *Spring Co.* v. *Edgar*, 99 U.S. 645, 658 (1879):

> "Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous."

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[12] Judge Becker's writings on evidence were cited by this Court in *Daubert,* 113 S. Ct. at 2793 n.4 and 2796.

Accordingly, the Circuits prior to *Daubert* generally followed a "manifestly erroneous" standard in reviewing district court rulings on admissibility of expert opinion testimony.[13]

Nothing in *Daubert* v. *Merrell Dow Pharmaceuticals* gives any hint that the rule of *Spring Co.* and *Salem* is now to be changed, so as to impose a tighter appellate review on trial judges who exclude expert opinions—a review explicitly disfavoring exclusion. On the contrary, *Daubert* in rejecting the mechanical rule of *Frye* v. *United States,* 293 Fed. 1013 (D.C. Cir. 1923), emphasized that trial courts in admissibility determinations under Rule 104(a) should be conscious of their duty to enforce Rules 702, 703 and 403, so as to make sure that opinions being presented to a jury are adequately grounded in science.[14]

The concern of *Daubert* was not, as the Third Circuit believed here, that courts of appeals should clamp down more on trial judges—particularly when, as here, the trial court has not merely listened to lawyers' arguments, but has actually heard testimony from prominent teachers and practitioners in the relevant scientific disciplines at extensive *in limine* hearings. Nor, certainly, did *Daubert* mean that more testimony lacking scientific foundation should be allowed in evidence. The emphasis of *Daubert* was exactly in the opposite direction: that trial courts should follow fair procedures and weigh appropriate fac-

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[13] *E.g., United States* v. *Tutino,* 883 F.2d 1125, 1134 (2d Cir. 1989), *cert. denied,* 493 U.S. 1081 (1990); *United States* v. *MacDonald,* 688 F.2d 224, 227-28 (4th Cir. 1982), *cert. denied,* 459 U.S. 1103 (1983); *Slaughter* v. *Southern Talc Co.,* 919 F.2d 304, 307 (5th Cir. 1990); *Perkins* v. *Volkswagen of America, Inc.,* 596 F.2d 681, 682 (5th Cir. 1979); *Apponi* v. *Sunshine Biscuits, Inc.,* 809 F.2d 1210, 1218 (6th Cir.), *cert. denied,* 484 U.S. 820 (1987); *United States* v. *Lundy,* 809 F.2d 392, 394 (7th Cir. 1987); *Hull* v. *Merck & Co.,* 758 F.2d 1474, 1477 (11th Cir. 1985); *Coleman* v. *Parkline Corp.,* 844 F.2d 863, 865-66 (D.C. Cir. 1988); *Milmark Services, Inc.* v. *United States,* 731 F.2d 855, 860 (Fed. Cir. 1984).

[14] *E.g., Daubert,* 113 S. Ct. at 2796: "We are confident that federal judges possess the capacity to undertake this review."

tors, but then should not ignore their "gatekeeping" responsibility, 113 S. Ct. at 2798, in expert evidentiary matters under the Federal Rules. *Daubert* implies more, not less, deference to the district courts. *Daubert* certainly gave no hint that appellate review of admissibility rulings should now become more demanding than the standard previously prescribed by this Court, which most courts of appeals were already applying: whether the trial court's ruling was "manifestly erroneous." And *Daubert* suggested no one-way bias in review—friendly to rulings allowing expert opinions, but hostile to district court rulings that exclude "junk science."

What the District Court did here satisfied, indeed far exceeded, every aspect of its duties prescribed in *Daubert*. The Court of Appeals could not and did not fault either the procedure—which included five days of hearings—nor the standards the District Court applied. Instead, the Third Circuit under its new "hard look" standard simply conducted a virtual *de novo* review that explicitly disfavored exclusion, and substituted its own judgment for that of the District Court (which had heard the testimony) as to whether the experts were qualified and the opinions based in science. Moreover, contrary to *Daubert*'s requirement of an evenhanded screening to protect juries from unscientific opinions, the Third Circuit says its more demanding standard of review is designed to be result-oriented: it applies when district courts exclude opinions, but not when they allow them.

III. THE ISSUE IS IMPORTANT.

It does not require the Seventh Circuit's observation that "[t]he issue that we have been discussing is important," *Mars* v. *United States, supra,* 25 F.3d at 1384, to recognize that the issue of standard of review for rulings under *Daubert* pervades federal litigation. The ubiquity of expert testimony in modern federal cases, both civil and criminal, and the very reason for adopting the Federal Rules of Evidence—to make evidentiary standards consistent throughout all federal courts—were recognized by

this Court when it granted review and decided *Daubert*.[15] It is not appropriate for the Third Circuit now to establish at the appellate level a far less deferential standard of review, that applies the Federal Rules of Evidence in a way wholly at variance with other Circuits.[16]

No aspect of any federal appeal is more important than the first question every court of appeals must ask: what is our standard of review? With evidentiary rulings on expert testimony occurring constantly in federal district courts, and regularly being appealed, the answer to that opening question should be the same in the federal courts of appeals throughout the country.[17]

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[15] "We granted certiorari . . . in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony." 113 S. Ct. at 2792.

[16] Several commentators have noted the need to settle what standard of appellate review is to be applied after *Daubert*. See Faigman, *et al., Check Your Crystal Ball at the Courthouse Door, Please*, 15 CARDOZO L. REV. 1799, 1820 (1994) ("[t]he *Daubert* court did not specify the standard appellate courts should use when reviewing a trial court's conclusions about the validity of proffered science"); Note, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability*, 47 VAND. L. REV. 1175, 1196 (1994) ("[a]nother issue unresolved by *Daubert* concerns the standard of review of trial judges' decisions about admissibility made pursuant to *Daubert*'s new, flexible inquiry"); Giannelli, *supra* n.10.

[17] The importance of uniformity in standards of appellate review is underscored by this Court's recent grants of certiorari in No. 94-562, *Wilton* v. *Seven Falls Co.*, 63 U.S.L. WEEK 3420 (*cert. granted* Nov. 28, 1994) (split in the Circuits as to the standard of appellate review for district-court abstention rulings), and No. 94-560, *First Options of Chicago, Inc.* v. *Kaplan*, 63 U.S.L. WEEK 3436 (*cert. granted* Dec. 5, 1994) (split in Circuits as to the standard of appellate review for district-court rulings on arbitration awards).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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